# THE CONCEPT OF JUDICIAL INDEPENDENCE

In a liberal republican democracy, judicial independence functions to set out and also protect political rights, civil liberties and also the rule of law [1] . As such, the three pairs of components are ought to be existed and balanced, in which the first pair of the component is the utility and efficiency. For this, courts must be useful to the society and must be efficient in all their conducts. In terms of utility, they must justly punish crimes, protect civil liberties and fairly resolve disputes. While in terms of efficiency, they should not cause waste and delay as these will lead to diminish of political support. The next pair of the component is the insulation and accountability. This indicates that the court has to be insulated from the politics of the other bodies which are the executive, legislature and political parties and at the same time not being influenced by any social and economic power. Besides, certain form of accountability should also contain in the court, this is because insufficient of accountability will erode public support towards the courts and encourages other political branches in attempting to exercise control so as to compensate for the lack of accountability. The last pair of the component will be the authority and restraint. This pair of component concern on the power of the courts. Courts must hold the judicial authority of the government and the ability to enforce their decisions and orders. The proper and correct incorporation of judicial authority in fact stabilises and makes others institutions appear to be more resilient. The court must also at the same time be restrained and must have self-imposed limits on the ability to act for executive or legislature would not long permit limitations upon their own powers in the face of an unrestrained court system.

Besides, the judiciary independence also means that judges must be free to interpret the laws independently, impartially and objectively without subject to any undue outside pressure from the police, the government, the military, public opinion, or any other interested body or person in order for justice to be performed. In most cases, this doctrine is secured by allowing judges long and sometimes even lifetime, tenure and making them difficult to be removed. However, the term judicial

it's considered desirable for courts and judges to possess. Thus, consequently, there exist two sources of confusion over its meaning whereby the first is conceptual which in the form of a lack of clarity relating to the kinds of independence that courts and judges are capable of possessing and the second is the normative that in the form of disagreement over what type of independence courts and judges must possess. So in order to be coherent and comprehensive, the judicial independence must address questions on particular sectors such as the question of independence for whom, the question of independence from whom, a question of independence for what and finally a question of independence for what purpose. The federal government of the United States of America, for example, gives all members of the Supreme Court and of the district courts and also the appeal courts lifetime tenure while other federal judges obtain substantial terms, such as fifteen years for judges of bankruptcy courts. On top of that, another prong of judicial independence is the proper judicial selection. The American Bar Association [2] which advocates for executive appointment of judges who have been cleared by screening committees, also so called as merit selection, is at odds with many state legislatures that prefer election by the general public. The American Bar Association and the state bar association usually view judicial election as rewarding political skills rather than legal skills. As for the case in year 2000 of Bush v. Gore [3] , in which it is seen by many as enforcing the requirement for judicial independence. This case has focused increased attention on judicial outcomes as opposed to the traditional focus on judicial qualifications.

## JUDICIAL INDEPENDENCE IN PRACTICE IN DIFFERENT COUNTRIES (DEVIATION FROM ITS ORIGINAL CONCEPT)

### United Kingdoms:

Judicial independence plays a very major role in British politics as it is fundamental to the British Constitution. The society of British mostly depends on the decisions upheld within the courts. It is vital for judges of any court who practise judicial functions and duties to administer and govern justice impartially and not for any individual benefits. In order to make sure that the well-functioning of the judiciary organs, certain conditions had been set out which are a judge can never participated in any case in which he belongs an interest of any nature. The judge will not hear the case if it has a direct interest to him but conventionally, he will declare it and question the parties on whether they are content that he should try the case. Besides, judges are totally independence, which means that they are free from the control of the government. Judges are appointed till the age of retirement and cannot be removed even though the senior appointments are occupied by nominees of the Lord Chancellor or Prime Minister unless for the special circumstances mentioned earlier. Obviously, judges are not immune from conducting any mistakes of law, and in certain extent, may allow sentences which are improper. However, the system of appeals has provided ample protection. Moreover, judges are fair and not bias in favour of the Crown [4] when it relates to a party to litigation. By contrast, the duty to protect citizens from the excesses was looked as the responsibility carried by them, where it's really rare in this country. Thirdly, those promotions open to judges cannot be achieved by means of partiality or influence and will not result in any distinctive financial acquisition. The judges are well paid by any standards, but it's possibly correct to say that

their wages are less than they could earn as barristers in private practice. The promotions of a High Court judge to the position of Lord Justice of Appeal, and from Lord Justice of Appeal to Lord of Appeal in Ordinary do not result in increment in salary. Under the judicial independence of UK, the courts must always remain independent and must not influence by external pressure and interference especially from the government. At any levels, judges must be affirm and confident that they are free from encountering any consequences when they take the government to task over government decisions. The judicial independence is guaranteed by the following, which is they behave a professional manner when in office, they are untouched by the government if they are dealing with the decision that is against the government act only if they maintain the highest standards in all scopes. Those involved in the judiciary are paid out of the Consolidated Fund in order to ensure that they are free from annual parliamentary criticism that might be used to set out future judicial decisions. In year 2002, the European court ruling is most likely to take precedence over a British court decision if the government act is supported by the judiciary and the acts backfire for any reason. Thus, the judiciary is said to be free from liability where the government will take the flak but not the judiciary since the act was originated by the government. They would argue upon the matters precisely and accurately, that they simply impose and enforce the law but that it's the parliament that enacts that law. Judges of a higher or superior court is protected from any proceedings either related to criminal or civil, in respect to any act that his judiciary has done though it might be malicious or not in good trust. Besides, a judge could not be sued for example, by a person whom he had incorrectly sentenced for imprisonment despite of the ability of the person concerned could provide clear evidence which he was innocent. The judges are not immune, but if it can be proven which his acts were outside their power of jurisdiction. However, practically, the High Court judges own such broad and wide jurisdiction that it's almost virtually impossible for these organs to act outside it. Such immunity also enjoyed by the judges of inferior courts but with the exception that if it's alleged that the judge had acted more than the jurisdiction has conferred to them, the onus is rely on the judge to decide and prove that what he had done was within his jurisdiction. Under the Justices' Protection Act 1848, the magistrates can be sued for the wrongful acts done maliciously or without any cause within their jurisdiction or also can be sued for any act performed without jurisdiction. As for civil and criminal liability, the general immunity were to be attached to others individual participating in the process of administration of justice pertaining to matters said or done by them in that capacity, such as witnesses or advocates and jurymen. Further, an individual is held to be guilty of the crime as per jury for giving incorrect and false evidence. Even those persons in charge who acting in a judicial capacity is provided the immunity mentioned, but they do not have immunities in their private capacities whatsoever and are liable civilly and criminally in the similar way as to that of other citizens. All in all, the only individual who enjoys the immunity from law will be the Queen in her personal capacity.

## Australia:

Basically, the doctrine of judicial independence in Australia is much more similar to that of the United Kingdoms. In Australia, there are three inter-related notions that are the judicial impartiality,

judicial independence and public confidence, all of which support a consensual and democratic society. However, the democratic structure will be weakened and the rights and freedoms of the citizens are at a state of risk if the public has lost confidence towards the impartiality or independence of the judiciary. The judges are eligible and should be concerned regarding the practice of denigration and also the process of growth of their office by the politicians, media members, by public commentators and nevertheless by the academicians and as well the legal profession members. There is an absence of debate in their system as such will overtake the reasoned and rational criticism of particular decisions and the lazy and effective way of generalised vilification. It is being said that is from the senior politicians who is more experienced that usually abandon any trial at reasoned descends and arguments into irrational abuse. The Federal court is prepared publicly to bad mouth High court. The best and most striking example of public vilification would be the assault made against the Justice Michael Kirby in the Senate on 12 March 2002.

The independence of the judiciary is a phrase which is familiar to judges and others relating to the political bodies and its necessities are freely acknowledged. However, its practical application of the theory or concept of this doctrine proven to be hard to achieved. This can be traced back to the past 400 years earlier where the powerful truths and the ringing words have been spoken and written down and a number of them are worth to be repeated. As on 13 November 1608 Coke Chief Justice, with the presence of fellow judges gathered in Whitehall Palace and on their behalf, responded to King James I's claimed that the judges were his shadows and at the same time his ministers, where by the King in his own person could not adjudge any case … which ought to be determined and adjudged in some court of justice as according to the law and custom of England … Causes which concern the life, or inheritance, or goods or fortunes of his subjects were to be decided by the judgement of law … where the law was the golden met-wand and measure to try the Causes of the subjects. In Marbury v Madison [5] , the Chief Justice of the Supreme Court of the United States, Marshall CJ said that it is emphatically the province and duty of the judicial department to say what is law. These are dramatic but defining assertions of the supremacy of the law and the importance of that supremacy. Until today, in Australia, too many people think judges are but public servants, person appointed to do the will of the legislature or the executive. This is however demonstrated that they are not is by Tait v The Queen [6] where upon granting an adjournment before considering the merits of an appeal, the High Court ordered that the execution of the prisoner applicant fixed for the next morning be not carried out but stayed pending the disposal of the applications. Thus, the above quotation signifies that the doctrine of rule of law is a vital element in the democratic system and by which judges are to play an important and irreplaceable role in maintaining this concept. This simply means that there will be existence of risk of a public perception that they'll not be impartial and stand between the subject and executive encroachments on the subject's liberty if the judges are not independent, where they are not free from the threats and any interference of the government. Under the Article 10 of the 1948 Universal Declaration of Human Rights [7] , every person is subjected to a fair or just and public hearing by an independent and tribunal in the determination of his obligations and rights and related to any criminal charges against him. Judicial independence is not an end in itself, but some self-serving judicial privilege, whereby it is a privilege

of the citizens and protects the people in the society which operates consensually and not by the exertions of an overwhelming presence of police. Besides, impartiality goes hand in hand together with independence. However, the public confidence is in turn depends upon the judges' adhering to their oath of office to do right in the sense of all manner of people without favour or any ill will. If they are seemed to favour one party, be it to be the Crown or citizen, the judge will sap public confidence, or show ill to either. Regardless of the essentiality of the judicial independence and the frequent repeated statements made by the community leaders in worldwide which this independence must be preserved, there are many do not appreciate what the expression implies. Only few who understand that the judicial independence is an important condition for maintaining the rule of law in which the rule of law will bind not only the citizen but including the legislature, the executive and the government and its officials. The governed and the governors stand equally before the law, which in short is known as equality before the law. Moreover, the rule of law protects not only those who are powerful, famous, righteous and influential but at the same time also protects the rights of the weak, unpopular and the members of the minority groups and particularly the rights of those being charged with criminal offences. How if Premier and famous radio commentators and celebrities publicly pronounce individual guilty of offences regarded by the community as heinous, then it is very important that those individual be judged according to the law by judges who are not populists but independent, in particular, impartial. Public confidence in the judges and thus the authority of the courts can be diminished without the public aware about it. In 1940 Lord Atkin wrote to Dr Evatt: "How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air, they know and care nothing about it until it is withdrawn."

In addition, the availability of the power and facilities to resolve disputes and enforce the law are necessary materials of judicial independence. Thus, the courts must have the power and facilities to do justice. As presented in a paper to the Third Annual Seminar of the Institute of Judicial Administration at Brisbane on 25 August 1984, the then by Chief Justice of Tasmania, Sir Guy Green stated that discussions regarding judicial independence often emphasised the necessity to ensure that the judiciary can carry out its job or work free from the improper influence and interference. That of course is a very vital part of judicial independence but is only an empty concept unless the judiciary is also provided with the power and facilities that are needed to enable it to perform its work. As a commentator writing about Franco's Spain cynically put it: "How are we to reconcile the existence of an independent of the judiciary with that of an authoritarian regime? Is not such a co-existence a flagrant paradox? The answer may be that the paradox is just apparent, for judges in contemporary Spain are independent but they are powerless. Or, as a Magistrado I interviewed put it to me, they are independent because they are powerless." Under the Section 476(1) of the Migration Act 1958, it empowered the Federal Court to review decisions of the Refugee Review Tribunal. The amendments stripped the Federal Court's power to review on the grounds, inter alia, that a breach of natural justice had occurred in connection with the making of the Tribunal's decision, which means on the ground of apprehended bias, compare Section 476(2)(a) and 197 CLR at 552.9 and also on the ground that the decision involved an exercise of power that was so unreasonable that no

reasonable person could have so exercised the power. Moreover, Section 476(1) provided that while a decision could be challenged on the basis that it was an improper exercise of power, the reference to an improper exercise of power was not to be taken as including a reference to the following which are when taking an irrelevant consideration into account in the exercise of a power, failing to take a relevant consideration into account in the exercise of a power, an exercise of discretionary power in bad faith or even in some cases, the exercise of a power in such a way that it represented an abuse of power. Thus, there is removed in respect to refugees an innate power of a superior court to review administrative action to ensure that the principles of natural justice have been observed and give relief where they have not as described in Wade and Forsyth [8] . Ironically, this is to be compared with the expressed attitude of the Government of China to conform to internationally accepted convention regarding the rule of law and the independence of the judiciary as in a recent forum in Beijing both Li Peng, the Chairman of the Standing Committee of the People's Congress and Chief Justice Xio Yang, President of the Supreme People's Court [9] . In the contrary, in Australia we witness at a Federal level retrospective exoneration of the government and its officers from the operation of the rule of law in Australia. It could also be argued that the judges were negatively influenced by the Australian media, in which the offensive remarks of talk-show hosts and their callers were frequently published in the press and reported on TV and the insulting remarks Australian journalists about the competence, intelligence and honesty of the Bali police and judiciary. These criticisms were no doubt reported by the Indonesian media. It is likely that the same criticisms were repeated constantly day after day even though they might have been made weeks before. However, there is no single ideal or perfect model that encapsulates perfectly the independence of the legal profession as different arrangements may be adopted in different countries and different areas of the law's operation. This fact was acknowledged recently by Chief Justice Gleeson of Australia in relation to judicial independence in the decision of the High Court of Australia in North Australia Aboriginal Legal Aid Service Inc v Bradley [10] , whilst there is diversity amongst nations over the precise methods used in implementation, it is important that the societies remain unified in the underlying commitment to the principle of the independence of the legal profession and to practical measures to ensure that it is upheld. This means that judges and lawyers must explain why it is important. Sometimes, to do so, they much reach over the heads of antagonistic sources of power in government, the community and the media, jealous of the law's independence.

## Malaysia:

In Malaysia, one of the characteristics of the law that tends to irritate other sources of power is the demand of the law's practitioners, which are the judges and lawyers for judiciary independence. The irritation is often correct of powerful and rich people and the politicians, government officials and media editors and their columnists. In the law and the courts, those who are used to be obeyed and feared commonly find it intensely annoying that there is a source of power that they cannot control or buy. The essence of a modern democracy is yet observance of the rule of law, where the rule of law will not prevail without assuring the judges and the practicing lawyers and also the legal

academics, which it's a very high measure of independence of mind and action. Judicial independence embodies both the individual and institutional aspects. As an institution, the judiciary must be respected as a separate, distinct and independent branch of government. At the same time, within the judiciary, the individual judges must have the substantive freedom necessary to perform their duties in an independent and impartial manner, beyond any improper or undisclosed influence and pressure. Besides, the notion and concept of judicial independence the judges to be free from any sort of interference in the exercise of their judicial powers whereby each judge ought to be independent from external influences which may seek to reduce his or her impartiality and objectivity. This needs independence both from the other branches of government and from any other influences that might influence the capacity of a judge in deciding a case strictly on the basis of its legal merits. On top of that, although the systems of appellate and judicial review necessarily impinge on a judge's independence actions, it also requires independence from other judges involved in decision making. An impartial assessment of the facts and objective application of the law are necessary for legal independence.

Practically, the doctrine of judicial independence incorporates a number of different factors, which in relation to the individual judge considerations, for example the security of tenure, competent appointments and ensuring adequate remuneration are minimum requirements for the maintenance of judicial independence. On the other hand, at an institutional level, those elements like separation from the other arms of government, administrative independence, sufficient resources and exclusive jurisdiction over matters for decision are vital for the establishment and maintenance of an effective judicature. In addition, an independent legal profession also needs the lawyers to be free in carrying out their work without interference or fear of reprisal. Within the law, the lawyers have a responsibility or duty, to advance the interests of their clients without any fear and to assist the courts in upholding the law. So as to ensure them to be able to perform these duties, it is important that lawyers must enjoy the professional independence. The challenges to such independence may evoke and arise where lawyers are unable to form independent professional organisations which are limited in the clients whom they may represent, where they are threatened with prosecution, disciplinary action or sanctions for undertaking their professional duties, where they are in any other way harassed or intimidated doe to their or because of the work that they undertake, or where they are subjected to unreasonable interference in the way they perform their duties.

As such, an independent legal profession is an essential guardian of human and other rights. The legal profession can operate as a check upon the arbitrary or excessive exercise of power by the government and its agents or by any other authorities and powerful parties to ensure that no single individual is beyond the reach of the law. Based on the advocacy and judgments upon the rule of law which is as opposed to the power or wealth of relevant interests or the transient popularity of the decision or of the interests concerned, both the lawyers and judges are important instruments for the protection of minority and individual rights. However, in Malaysia, though they might be no overlaps in the membership related to the position of the judiciary and the legislature, it is very important to note that there is existence of overlaps regarding the functions, for example, the

legislature is viewed as performing the function of the judiciary by regulating its own composition and procedure like enforcement of breach of parliamentary privilege or contempt of parliament which can be seen under Article 63(1) which states that the validity of any proceedings in either House of Parliament or any committee shall not be questioned in any court. The judicial organ is viewed as performing the function and role of the legislature through the doctrine of judicial precedent. As to the relationship between the judiciary and the executive, even though there maybe no overlaps in the membership, Malaysia's arm has always dominated the government, more so in recent years at the expense of the judiciary, generally the weakest arm of the tripartite structure. At this point, it is vital to take note that the decline of the equal status of the judiciary is due to the two principal factors in which the first is the executive sees itself as the legitimate representation of the popular will expressed through its election and control of Parliament. This is also interpreted as a mandate for its legislative programmes and therefore, resents judicial pronouncements that challenge legislative or executive acts which can be seen in the Judicial Crisis of 1988 [11] . The second factor causing the judicial downgrading flowed from earlier events, that is, the enactment of the Constitutional (Amendment) Act, 1988 [12] . The enactment of the Amendment severely restricted the constitutional role of the judiciary and left no doubt as to its functions as in Article 121 which provides that the judicial power is no longer vested in the courts and their jurisdictions and powers are defined by laws enacted by Parliament. Looking at the relationship between the judiciary and the executive, the executive arm plays a vital role in the appointment of judges of Federal Court, Court of Appeal and of the High Courts as under Article 122B where the YPDA acts on the advice of the Prime Minister in appointing the judges. A nominee to the superior courts must have at least 10 years of experience at the Bar or as a member of the judicial and legal service. Besides, Article 122B requires an extensive process of consultation. The AG who is part of the executive organ is viewed as performing a judicial function and the PM is behind his or her appointment as stated under the Article 145(1), 145(2) and 145(3) of the Federal Constitution. The judges of the Sessions and magistrates' courts are members of the judicial and legal service. They are transferable from the Bench to the Attorney-General's Chambers and the government departments. Their institutional link with the executive and the influence of the executive on their transferability and career paths subject them to problems and pressures that should have been avoided. The Chairpersons of hundreds of administrative tribunals are not full-time judges and often they are administrators or politicians with no legal qualification. Their links with the executive may create the appearance of institutional bias. There are the availability of check and balance between the legislature and the judiciary, whereby no members of Parliament can hold judicial office and vice versa. This is to maintain the independence of the judiciary, which means that the members of the judiciary must not engage themselves in politics. The judiciary can declare an Act of Parliament as unconstitutional under Article 4(1) on the supremacy of the Constitution. The judges are expected to perform their duty according to the obligations of the Constitution and their understanding of the law. The conduct of the judges may not be the subject of discussion in the State Assembly and although it may be discussed in the Parliament, it can only be done on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House as in Article 127 of the Federal

Constitution. The judiciary is able to control over the subsidiary legislation. This is by virtue of sections 23(1) and 87(d) of the Interpretation Acts 1948 and 1967 which, in effect, lay down the principle that any subsidiary legislation which is inconsistent with an Act of Parliament or State Enactment shall be void to the extent of the inconsistency. However as for the check and balances among the executive and judiciary, where no member of the executive can hold judicial office and vice versa. This is to protect the independence of the judiciary which is to avoid from having conflict of interest, and many more. Judges do not hold their office at the pleasure of the YDPA or the executive. They can be removed from office but only on misbehaviour or inability to properly discharge the functions of their office as can be viewed under Article 125(3) of the Federal Constitution. Although the executive arm plays a vital role in the appointment of judges of the superior courts, there are safeguards. For example, Article 123 prescribes the minimum qualification. A nominee to the superior courts must have at least 10 years at the Bar or as a member of the judicial and legal service. The Federal Constitution contains express provisions to secure independence of the judiciary, either from the control or interference by the executive or the legislature. These includes: the procedure for the removal of superior judges. The Article 125(3) of the Federal constitution guarantees on the judges' remuneration and terms of office as in Article 125, prohibitions on public discussion on judges' conduct in Article 127 and power of the judges to punish for contempt in Article 126. Some of the checks & balances are not really effective due to the following reasons such as the government which usually controls an overwhelming majority in Parliament tends to dictate its legislative programme and the constitutional role of the judiciary severely restricted by the enactment of Constitutional (Amendment) Act, 1988. Before the amendment, the Article clearly stated that judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status … and in such inferior courts as may be provided by federal law. It is also made ineffective with the availability of latent threats. This latent threat exists as finance and other resources necessary for the judiciary to carry out its functions effectively are basically under the control of the executive, for example, the award of titles such as Tunship, Tan Sriship. Looking at the commentary of Art 122B, the Prime Minister could insist on the appointment of a judge even if the Conference of Rulers did not agree or withheld its views, or delayed the giving of its advice to the YDPA. The appointment of judges is a matter between the YDPA and the Prime Minister personally. The Prime Minister need not respond to a request from the Conference of Rulers for revocation of an appointment which has already been made. It is only consultation. This means no consent is required and it is not binding. By law, judges of the subordinate courts are part of the Judicial and Legal Service of the Federation and are transferable from the Bench to the AG's office chamber. There are weaknesses of the parliamentary procedures such as the question time, debates and the committees where question time is viewed as a mere parliamentary ritual. Besides, the inefficiency of check and balances is also due to the lack of equal information to the Members of Parliament, which simply means that those from the opposition parties lack information and thus unable to play the role of a check and balance effectively.

In short, in spite of the overlapping in membership, functions and powers, Malaysian constitution secures this dimension quite well. There is separation of powers between the judiciary, on the one